

IN THE  
United States Court of Appeals  
For the Ninth Circuit

---

AH PAH REDWOOD Co., a Corporation, *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

---

On Petition for Review of the Decision of the Tax Court  
of the United States

---

MOTION FOR PERMISSION TO FILE SUPPLEMENTAL  
BRIEF AND SUPPLEMENTAL BRIEF FOR  
THE RESPONDENT

---

CHARLES K. RICE  
*Assistant Attorney General*

LEE A. JACKSON  
ROBERT N. ANDERSON  
WALTER R. GELLES

*Attorneys*  
*Department of Justice*  
*Washington 25, D. C.*

**FILED**

AUG - 6 1957

PAUL P. O'BRIEN, CLERK

---



## INDEX

	Page
Respondent's motion for permission to file supplemental brief	1
Supplemental brief for the respondent .....	2
Argument:	
The oral agreement constituted an enforceable contract. In any event, even if the timber was disposed of by contract on the date of removal, under such contract taxpayer retained no economic interest in the timber ....	2
Conclusion .....	2
Appendix .....	7

## CITATIONS

### CASES:

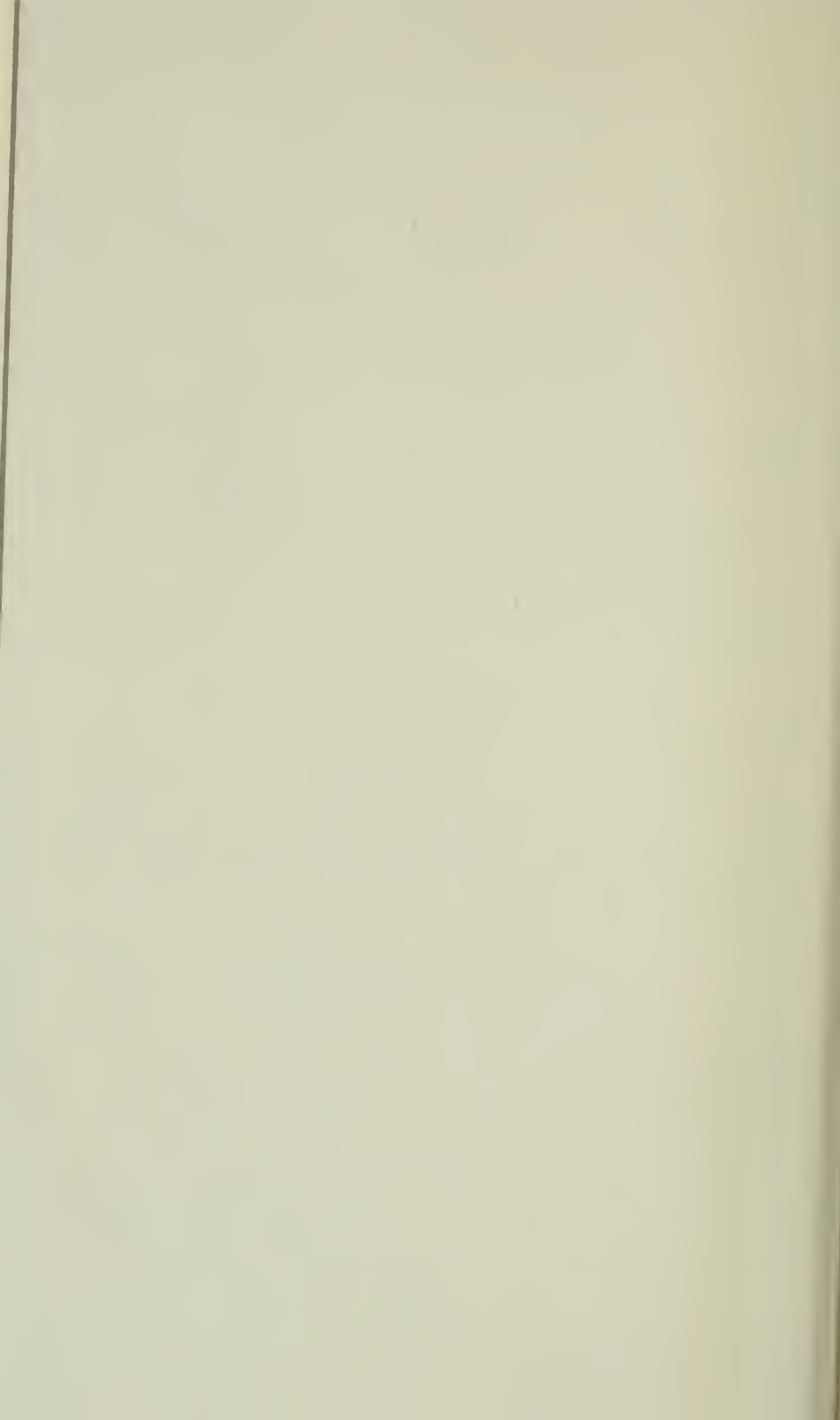
<i>Gensinger v. Commissioner</i> , 208 F. 2d 576 .....	4
<i>Iowa Bridge Co. v. Commissioner</i> , 39 F. 2d 777 .....	4
<i>Jones v. Helvering</i> , 74 F. 2d 214 .....	4
<i>Nelson v. United States</i> , 131 F. 2d 301 .....	4
<i>Norfolk Nat. Bank of C. and T. v. Commissioner</i> , 66 F. 2d 48	4

### STATUTE:

Internal Revenue Code of 1939, Sec. 117 (26 U.S.C. 1952 ed., Sec. 117) .....	2, 5
--	------

### MISCELLANEOUS:

Restatement of the Law of Property (1944), Sec. 519 ....	2
--	---



IN THE  
United States Court of Appeals  
For the Ninth Circuit

---

No. 15434

---

AH PAH REDWOOD Co., a Corporation, *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

---

On Petition for Review of the Decision of the Tax Court  
of the United States

---

RESPONDENT'S MOTION FOR PERMISSION TO  
FILE SUPPLEMENTAL BRIEF

---

The Commissioner hereby moves this Court for permission to file this supplemental brief due to the fact that taxpayer, in its reply brief, has altered the position adopted by it in its opening brief, and thereby raises an argument not foreseeable by the Commissioner when he prepared his answering brief.

CHARLES K. RICE

*Assistant Attorney General*

AUGUST, 1957

**SUPPLEMENTAL BRIEF FOR THE RESPONDENT****ARGUMENT****The Oral Agreement Constituted an Enforcible Contract. In Any Event, Even if the Timber Was Disposed of by Contract on the Date of Removal, Under Such Contract Taxpayer Retained No Economic Interest in the Timber**

Taxpayer's entire argument in its opening brief concerning the holding period [Point C, Br. 24-30] presupposes the existence of a valid contract. In fact taxpayer repeatedly refers to the oral agreement as a contract. Taxpayer's argument in its opening brief was that the oral contract constituted a licensing contract, and that, since a license in realty is revocable,<sup>1</sup> the date of disposal of any particular timber was the date when such timber was cut and removed.

We think our answering brief effectively disposes of this argument, and apparently counsel for taxpayer agrees, for taxpayer's reply brief abandons the argument that the oral contract was a licensing contract, and urges instead an entirely unrelated and inconsistent theory, that the oral agreement was not a contract at all. This theory is based on taxpayer's contention that there was no mutuality of obligation. Since the disposal under Section 117(k)(2) must be under a "contract", and since according to taxpayer's theory the oral agreement was not a contract, taxpayer concludes that there could be no disposal at the date of the oral agreement.

---

<sup>1</sup> It should be observed that, even though a contract by which a license in realty is created may be revocable, a legally unjustifiable revocation will be actionable for damages as would a breach of any other type of contract. Restatement of the Law of Property (1944), Section 519, Comment (b).

Taxpayer now claims that the permission granted under the oral agreement to cut and remove timber was merely an offer from taxpayer which was accepted by the act of performance on the part of Coast Redwood, and that, therefore, no contract was consummated until the timber was cut and removed. Presumably each act of cutting and removing timber served to execute a new and separate contract of disposal, and since most of the timber was removed after the six-month holding period, capital gains would largely be available, according to taxpayer.

The important and overriding fact which taxpayer ignores is that both parties entered into a stipulation (Appendix, *infra*) dated May 10, 1955, in which it was agreed that the oral agreement of October, 1947, was "an oral or implied contract."<sup>2</sup> The Tax Court's characterization of the oral agreement (R. 18) as "an oral or implied contract" was based upon the stipulation. The word "contract" is a word of act denoting certain legal elements, one of which is mutual obligation. By stipulating that the agreement constituted a "contract", taxpayer accepted as fact that those elements necessary to create an enforceable contract, including mutuality, were in existence. This is especially true inasmuch as the stipulation was agreed to and signed by taxpayer's counsel, who it must be assumed used the word "contract" in its legal sense

---

<sup>2</sup> The pertinent portion of the stipulation, which was not printed but which is part of the record on appeal, reads:

3. Petitioner allowed Coast Redwood Co. (an affiliate) to start cutting timber on this tract shortly after purchase and pay \$5.00 per thousand feet as removed. *This was an oral or implied contract.* (Italics supplied.)



as embodying mutually enforceable obligations on both parties.

It is, of course, apparent that the stipulation does not fully describe the terms of the contract. The Tax Court found that there was no direct evidence of the precise terms of the contract. (R. 23.) The stipulation describes in broad terms only Coast Redwood's rights, but does not define its obligations other than to pay \$5 per thousand board feet. But in view of the fact that the purpose of the stipulation was to obviate the necessity of introducing evidence to prove those matters therein agreed to, the absence of any detailed account of Coast Redwood's obligations cannot be so construed as to impeach the description of the agreement as a "contract". In the proceeding before the Tax Court, taxpayer made no attempt to amend or withdraw the stipulation, and the trial proceeded on the assumption by both parties and the Tax Court that the agreement was a "contract." The Commissioner, relying on the word "contract" as embodying a mutually enforceable agreement cannot now be prejudiced merely because the stipulation does not fully describe the terms of such contract. It is highly inappropriate for taxpayer to raise this issue for the first time at the appellate stage after having stipulated at the trial stage that the agreement was a contract. *Gensinger v. Commissioner*, 208 F. 2d 576, 579-580 (C.A. 9th); *Nelson v. United States*, 131 F. 2d 301, 304 (C.A. 8th); *Jones v. Helvering*, 71 F. 2d 214 (C.A. D.C.); *Norfolk Nat. Bank of C. and T. v. Commissioner*, 66 F. 2d 48 (C.A. 4th); *Iowa Bridge Co. v. Commissioner*, 39 F. 2d 777 (C.A. 8th).

Furthermore, taxpayer's new theory that the oral agreement was not an enforceable contract does not aid



its case in any event. To the contrary, even accepting *arguendo* taxpayer's contention that there was a lack of mutual obligation, another insurmountable barrier bars the road to capital gains treatment. Section 117(k)(2) requires for its application not only that the disposal of the timber be under a contract, but that it be under a contract "by virtue of which the owner retains an economic interest in such timber." Under taxpayer's new theory there was no disposal until the timber was removed. But since Coast Redwood was to pay a definite predetermined price for the timber at the time of its removal, payment would have been complete before it could be said that the disposal was final. It seems obvious, therefore, that at the moment of final disposal under this new theory, taxpayer would have had no claim against the timber and thus no economic interest in it. Taxpayer admits that disposal under this theory would be by way of outright sales. (Reply Br. 10.) But as vendor who has been fully paid, taxpayer could not be said to have retained any economic interest in the timber. Since the statute requires that the disposal be accompanied by the retention of an economic interest in the timber, taxpayer would not qualify under Section 117(k)(2) in any event.

**CONCLUSION**

The decision of the Tax Court was correct and should be affirmed.

Respectfully submitted,

CHARLES K. RICE

*Assistant Attorney General*

LEE A. JACKSON

ROBERT N. ANDERSON

WALTER R. GELLES

*Attorneys*

*Department of Justice*

*Washington 25, D. C.*

AUGUST, 1957

**APPENDIX**

THE TAX COURT OF THE UNITED STATES

Docket No. 50695

AH PAH REDWOOD Co., a California Corporation,  
*Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

**Stipulation**

IT IS HEREBY STIPULATED AND AGREED between the Commissioner of Internal Revenue and the above entitled taxpayer, by their respective undersigned attorneys, that the following facts shall be taken as true; provided, however, that this stipulation does not waive the right of either party to introduce other evidence not at variance with the facts herein stipulated or to object to the introduction in evidence of any such facts on the grounds of immateriality or irrelevancy.

1. Petitioner is a corporation incorporated under the laws of California with its mailing address at 1101 S. W. 5th Avenue, Portland, Oregon. The returns for the periods here involved were filed with the Director of Internal Revenue for the District of Oregon. During the periods here involved, petitioner used the calendar year for reporting its income.

2. Petitioner was organized in October 1947. In October, 1947, petitioner purchased all the right, title and interest of the buyer in a certain Purchase Agreement and all the timber and land covered thereby, dated December 13, 1946, between Sage Land and Lumber Company, Inc., as Seller, and Union Bond & Trust Company, as Buyer. A copy of this Agreement is attached hereto, marked Exhibit 1-A and is hereby

made a part hereof. Hereafter this Agreement will be called the "Sage Agreement".

3. Petitioner allowed Coast Redwood Co. (an affiliate) to start cutting timber on this tract shortly after purchase and pay \$5.00 per thousand feet as removed. This was an oral or implied contract.

4. On January 9, 1950, petitioner entered into a formal written Agreement with Coast Redwood Co., whereunder petitioner agreed to sell all of the timber and land covered by the Sage Agreement to Coast Redwood Co. A duplicate original copy of this agreement is attached hereto, marked Exhibit 2-B and made a part hereof.

5. In the years 1948 and 1949 here in question petitioner reported its income on the sales of timber to Coast Redwood Co. as long term capital gains.

6. In reporting its income on the timber sold to Coast Redwood Co. petitioner used the basis for depletion of \$3.941566 per thousand board feet. Respondent also used this basis in computing a portion of the deficiencies against petitioner here in question.

7. The basis for depletion, described in Paragraph 6 above, was computed by petitioner and respondent in the following manner:

In October 1947 petitioner purchased the Sage Agreement and the timber covered thereby for a purchase price of \$1,443,838.99. It was assumed by petitioner that the correct amount of the Sage timber was as is shown on Schedule A of the Sage Agreement (Exhibit 1-A) and the basis for depletion was computed by dividing the assumed quantity of timber into the total purchase price.

8. In addition to other sales, petitioner sold 33 million, 883 thousand board feet of timber covered by the Sage Agreement to A. K. Wilson Lumber Company in 1950. This quantity of timber was assumed to be

the above amount on the basis of the quantities shown in Schedule A to the Sage Agreement.

9. Prior to petitioner's acquisition of the Sage Agreement, International Pacific Pulp and Paper Co. sold 16 million 22 thousand and 60 board feet of the timber covered thereby to Coast Redwood Co. in the years 1946 and 1947.

Dated this 10th day of May, 1955.

Sgd. JAMES C. DEZENDORF  
*Attorney for Petitioner*

Sgd. JOHN P. BARNES  
John P. Barnes  
*Chief Counsel*  
*Internal Revenue Service*

